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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

CLARK COUNTY WASHINGTON, CITY OF LA CENTER,
GM CAMAS LLC, MACDONALD LIVING TRUST, &
RENAISSANCE HOMES,

Respondents,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, JOHN KARPINSKI,
CLARK COUNTY NATURAL RESOURCES COUNCIL,
& FUTUREWISE,

Appellants

FUTUREWISE SUPPLEMENTAL BRIEF

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FUTUREWISE
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I. Introduction

On January 18, 2010, in response to the City of La Center's Motion for the court to take judicial notice of the U.S. Department of Interior's ("USDOl" or "DOI") December 17, 2010 decision approving the Cowlitz Tribe's fee-to-trust application for land contained within parcel LB-2, an area of land whose legal status is pending review in this case, this Court ordered appellants' counsel to file a supplemental brief discussing the effect, if any, of the DOI's decision on the legal questions before this court with regard to parcels LB-1, LB-2, and LE. The La Center Urban Growth Area ("UGA") expansion was a proposal by Clark County to expand the boundary of the UGA to include the entirety of the Cowlitz Parcel.

I. When the U.S. Department of Interior takes fee land into trust for a federally recognized Indian Tribe, jurisdiction of the land is transferred to the federal government pursuant to the procedures established under federal laws and in accordance with its trust responsibility to Tribes.

On December 17, 2010, the DOI issued a Record of Decision (hereinafter "ROD") for the Trust Acquisition of and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe ("the Tribe"), which is located near the city of La Center, Washington. The ROD announced that the

action to be implemented was the acquisition in trust of the 151.87-acre Cowlitz Parcel, among other things relating to tribal government.¹ The procedures and policies concerning the Secretary's exercise of discretion for acquiring lands in trust for Indian tribes and individuals are set forth in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465 et seq. and 25 C.F.R. part 151 et seq.

The IRA provides that "title to any lands or rights acquired pursuant to the IRA shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."² Thus, jurisdiction is effectively conveyed to the Department of Interior and the Tribe, and management of that trust land is largely the province of the tribe and the federal government, with a few exceptions, as discussed in Section II of this Brief.

On May 14, 2008, the Growth Management Hearings Board issued a decision in response to an appeal of Clark County's approval of an update of its Comprehensive Plan, issued in September 2007, that resulted in the expansion of the City of La Center's Urban Growth Area (UGA). The Board's decision found the UGA expansion to be out of compliance

¹ ROD, Introduction

² 25 U.S.C. § 465.

with the Growth Management Act (GMA)³ and remanded the matter to Clark County.

II. A part of LB-2 will become land held in trust for the Cowlitz Tribe, which obviates the ability of the county or the GMHB to apply State statutes and County ordinances to these parcels.

Cowlitz County, in its Comprehensive Plan update, proposed an expansion of the La Center UGA. This action was appealed to the Growth Management Hearings Board for the Western Region (WWGMHB) by the Appellants to this action. The La Center UGA expansion proposed to expand the boundary of the UGA to include expansion areas LB-1, LB-2 and LE. The 151.87-acre Cowlitz Parcel makes up part of expansion area LB-1. On May 14, 2008, the WWGMHB issued a decision, in which it found that the County's expansion of the UGA was not completed in accordance with the Growth Management Act. The County appealed the Board's decision to Clark County Superior Court, who reversed the Board's decision, effectively returning the land to the UGA. The present Appeals Court action is an appeal of that Superior Court decision.

However, since the Cowlitz Parcel is taken into trust by the United States Department of Interior (USDOl) for the Tribe, the property has been removed from the jurisdiction of both the Growth Management Hearings Board and from the jurisdiction and land use authority of Clark

³ RCW 36.70A *et seq.*

County and the City of La Center. If the Cowlitz Parcel is removed from the UGA, it would be re-designated as agricultural land. If the Cowlitz Parcel remains within the UGA, it will be designated Industrial Urban Reserve. However, the implementation of the decision to take fee land into trust for the Cowlitz Tribe would not be consistent with local land designations, whether or not the Cowlitz Parcel remains within or is removed from the La Center UGA, because the federal government will be taking the Cowlitz Parcel into trust for the benefit of the Tribe, which affirmatively removes the parcel from the application of State and local government rules and regulations, and forecloses local jurisdictional questions.

Trust lands are only required to comply with federal and tribal laws.⁴ Thus, the Tribe is obligated to comply with numerous mitigation measures in the Tribe's Environment, Public Health, and Safety (EPHS) Ordinance,⁵ which are specifically designed to protect the local community from adverse impacts and which require that the Tribe develop the property in a manner that is consistent with specified County environmental and land use ordinances.

⁴ 25 U.S.C. § 465 *et seq.*

⁵ Cowlitz Tribal Ordinance 07-02 (2008).

In addition, the Tribe may exercise its right to agree to Public Law 280 ("P.L. 280")⁶ jurisdiction, wherein the State of Washington would be required to provide law enforcement on the Cowlitz Parcel. However, if agreements with local governments cannot be reached concerning fire protection, law enforcement, and emergency services, these public services would be provided by the Tribe pursuant to the Tribe's EPHS ordinance. Any such public services that would have been provided by the County or city of La Center in the La Center UGA would either be provided by the State of Washington (if the Tribe elects to agree to P.L. 280 jurisdiction), or by the Tribe itself if no local agreements can be executed for the provision of such services. However, since the land is in trust, whether the land is within or outside the urban growth area is irrelevant for the provision of urban services.

III. LB-1, parts of LB-2, and LE still qualify as agricultural lands of long-term commercial significance.

The ROD indicates that Tribal Government facilities, tribal housing, a cultural center, a casino, a hotel, a convention center, and ancillary infrastructure is to be constructed on the site.⁷ This construction will not affect LB-1 since it is across I-5 from the trust land. Since the trust land is to be served by an onsite sewage treatment plant, sewer lines

⁶ 28 U.S.C. § 1360.

⁷ ROD, Introduction p.1.

will not serve LB-1.⁸ It does not appear that water supply or other infrastructure will affect area LB-1.⁹ While natural gas service will be provided to the interchange, urban development cannot occur without sewer and other facilities.¹⁰ Indeed the ROD concluded that “the growth inducing effects would be less than significant.”¹¹ So the long-term commercial significance factors in WAC 365-190-050(3)(c) are not affected.

LB-2 is 244.63 acres in size, so a little over 92 acres will remain in the county’s jurisdiction in LB-2. It is frankly too early to tell how the development of the trust lands will affect the 92 acres. The Trust Land is on the north side of LB-2. If the development along the south boarder of the Trust Land is buffered, it may have little or no impact on agricultural activities to the south. It does not appear that any public facilities on the site are available to serve any offsite development.¹² While natural gas service will be provided to the interchange, urban development cannot occur without sewer and other facilities.¹³ Indeed the ROD concluded that

⁸ ROD p. 9.

⁹ ROD pp. 8 – 9; p. 29.

¹⁰ ROD p. 20.

¹¹ *Id.*

¹² ROD pp. 8 – 9; p. 29.

¹³ ROD p. 20.

“the growth inducing effects would be less than significant.”¹⁴ While the proposed development would fit under the history of development permits which is one of the WAC long-term commercial significance factors in WAC 365-190-05(3)(c)(ix), the weight of the factors in County’s Agricultural Analysis still weights towards designating the balance of LB-2 as agricultural lands of long-term commercial significance.

UGA expansion area LE is south of the Trust Land and separated from the trust land by the 92 acres in LB-2 that has not been put into trust. It does not appear that any public facilities on the site are available to serve any offsite development.¹⁵ LE is separated from the developed part of LB-2, so the history of development permits in the vicinity is not affected. LE is quite a distance from the interchange and apparently natural gas supply line. So adding part of LB-2 into trust status and the development of the Trust Property will not change whether LE qualifies as agricultural lands of long-term commercial significance.

IV. Conclusion

Because the jurisdiction of the Cowlitz Parcel is trust land held by the federal government in trust for the Cowlitz Tribe, state and local laws, including the decisions of the GMHB, will not apply on that parcel.

¹⁴ *Id.*

¹⁵ ROD pp. 8 – 9; p. 29.

However, even with including the land in trust and the planned development, urban growth area expansion areas LB-1 and LB-2 still qualify as agricultural lands of long-term commercial significance as does the 92 acres of LB-2 not in trust.

Respectfully submitted this February 11, 2011,

A handwritten signature in black ink, appearing to read "Jill J. Smith", with a long horizontal flourish extending to the right.

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DECLARATION OF SERVICE

The undersigned hereby certifies that she caused a copy of this
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


Dated this 11th day of February, 2011

/s/Jill J. Smith
Jill J. Smith

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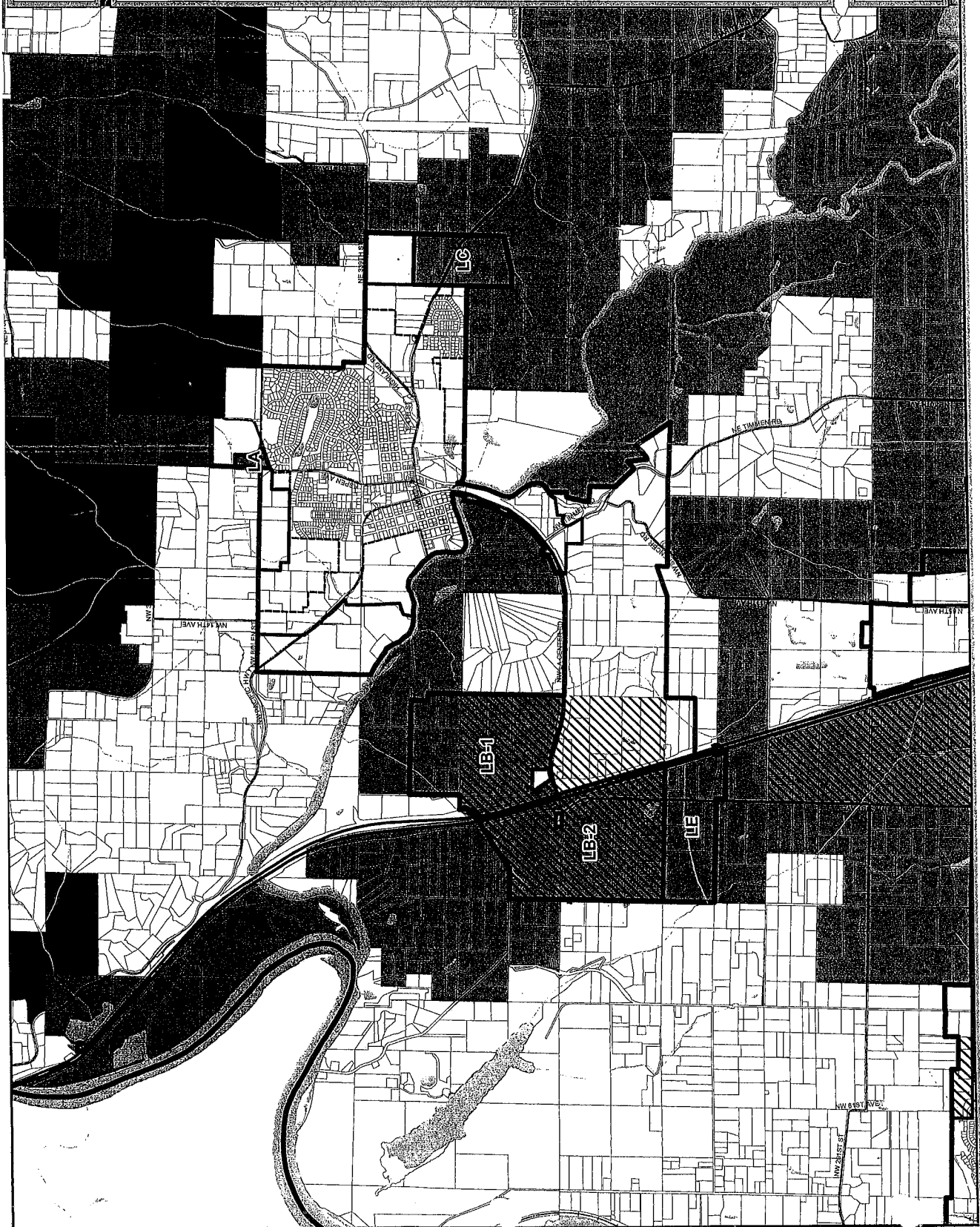
Agriculture Viability Study Areas BOCC Tentative Urban Growth Area La Center UGA

Key

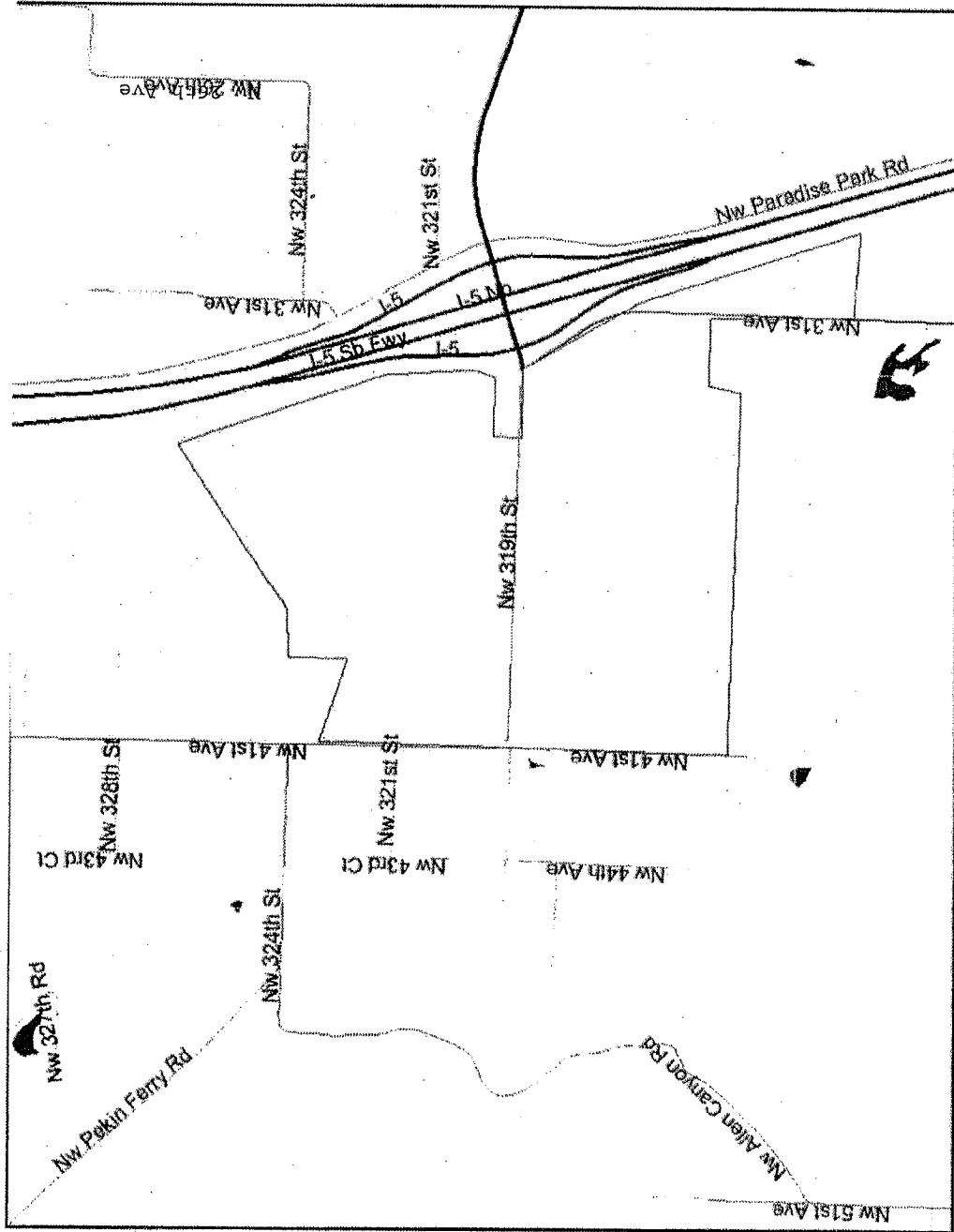
-  Study area boundary
-  BOCC Tentative UGA boundary
-  Adopted 2004 UGA boundary
-  City Limits
- Zoning**
-  Agriculture-20
-  Forest-Tier II
- Zoning Overlay**
-  Urban Reserve - 10
-  Industrial Urban Reserve - 20
-  Surface Mining Overlay District



Clark County
Department of Assessment and GIS
2004
Prepared by: Clark County Department of Assessment and GIS
Source: Clark County Department of Assessment and GIS



Cowlitz Parcel



Legend

- Roads
 - Alley
 - Arterial
 - DNR
 - DNR (Private Land)
 - Driveway
 - Interstate
 - Interstate Ramp
 - Primary Arterial
 - Private Roads
 - Private Roads w/o Names
 - Public Roads
 - SR Ramp
 - State Route
- Roadnames
- Waterbodies
- City Boundaries
- County Boundaries
 - Battle Ground
 - Camas
 - Clark County
 - La Center
 - Ridgefield
 - Vancouver
 - Washougal
 - Woodland
 - Yacolt
- Urban Growth Boundaries
 - Battle Ground
 - Camas
 - County
 - LaCenter
 - Ridgefield
 - Vancouver
 - Washougal
 - Woodland
 - Yacolt

Scale: 1:12,000

Map center: 45° 51' 8" N, 122° 42' 37" W